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In the Supreme Court of the United States

OCTOBER TERM, 1965.

No. 381.

RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128, 633 and 954,

Petitioners,

v.

LION DRY GOODS, INC., *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit.

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OPINIONS BELOW.

This case, on its first decision by the District Court, is reported at 179 F. Supp. 564 and is appended hereto at page 21. The decision of the United States Court of Appeals for the Sixth Circuit affirming that ruling is reported at 286 F. 2d 235 (Appendix p. 29, *infra*). This Court granted certiorari, 366 U. S. 917.

The decision of this Court reversing the Court of Appeals and remanding this case to the District Court for further proceedings consistent with this Court's opinion is reported at 369 U. S. 17.

The order of the District Court, upon remand, granting plaintiffs' motion for summary judgment is unreported. The opinion of the Court of Appeals, reversing the District Court is reported at 341 F. 2d 715 (Appendix p. 30, *infra*).

STATEMENT OF JURISDICTION.

The order of the Court of Appeals for the Sixth Circuit was entered on February 23, 1965 (Appendix p. 49, *infra*). There was no motion made for re-hearing.

Jurisdiction of this Court is based upon 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Under Section 301 of the Labor Management Relations Act of 1947—

(1) May a court deny enforcement to an arbitration award by substituting its interpretation of a contract for that of the arbitrators as to the right of the Union to process a grievance?

(2) May a court deny enforcement to an arbitration award on the ground that the arbitration agency had no power to serve as arbitrators, even though the arbitration agency was specifically agreed upon by all parties, and even though the arbitration agency's power was not questioned until three years after the award?

STATUTE INVOLVED.

The only constitutional or statutory provision involved in this case is Section 301(a) of the Labor-Management Relations Act of 1947, 29 U. S. C. Section 185(a), which reads as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

This case is brought to this Court for a second time, seeking once again to establish important principles of law concerning the national labor policy in the judicial enforcement of arbitration awards.

This Court previously held, 369 U. S. 17, that an agreement which settled a long, costly and bitter strike between the parties in Toledo, Ohio, supported an action for enforcement in the federal courts as a contract within Section 301 of the Act.[1] Significant portions of Mr. Justice Brennan's opinion, which establishes the critical background for this second petition for certiorari, are set forth at 369 U. S. 17, 28:

> "It is enough that this is clearly an agreement between employers and labor organizations significant to the maintenance of labor peace between them. It came into being as a means satisfactory to both sides

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[1] The detailed facts of this case are set forth fully in this Court's previous opinion, 369 U. S. 17, and in the most recent opinion of the Court of Appeals, 341 F. 2d 715. After some 13 months of a strike and picketing, the unions and the Toledo department stores executed a Statement of Understanding under date of December 24, 1958. In addition to such key provisions of the Statement of Understanding as wage provisions and other conditions of employment, the parties agreed to submit disputes under the Statement to the Toledo Labor-Management-Citizens' Committee (hereinafter L-M-C). This provision is contained in Section 7 of the LaSalle's Statement, set forth in full at 369 U. S. 17, 20, f. n. 4:

> "7. Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with the L-M-C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the chairman of the L-M-C who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding. The panel shall render its decision and order within fifteen days after the grievance has been submitted to it. The procedure regulating the hearing of the grievance by the L-M-C panel shall be determined by the panel."

for terminating a protracted strike and labor dispute. Its terms affect the working conditions of the employees of both respondents. It effected the end of picketing and resort by the labor organizations to other economic weapons, and restored strikers to their jobs. It resolved a controversy arising out of, and importantly and directly affecting, the employment relationship. Plainly it falls within Section 301(a). '[F]ederal courts should enforce these agreements on behalf of or against labor organizations and * * * industrial peace can be best obtained only in that way.' *Textile Workers Union, etc. v. Lincoln Mills*, etc., 353 U. S. 448."

Yet, the Court of Appeals still refuses to enforce this agreement on remand on grounds which are in severe derogation of the national labor policy as repeatedly pronounced by this Court. The ruling of the Court of Appeals emasculates this agreement, destroys the industrial peace agreed upon by these parties, and would erect technical impediments to the judicial enforcement of arbitration awards everywhere.

Following reversal and remand by this Court plaintiff unions moved for summary judgment in the District Court on May 3, 1962. On May 24, 1962, defendants moved for an order seeking to file an amended answer to present alleged new defenses, despite the full hearing on the merits that had been accorded when the matter was originally reached for trial in the District Court. On September 25, 1962, plaintiff's motion for summary judgment was granted, without opinion, and the following day, defendants' motion to amend their answer was overruled.

As this Court said, at 369 U. S. 17, 24, f. n. 6, "The parties stipulated as to the arbitration proceedings that it was 'assumed by all parties in attendance to be a meeting of a panel chosen * * * to perform proper functions dele-

gated to such a panel under the provisions of * * * [the] Statements of Understanding * * *.'" In the same note, this Court further said, "* * * they participated in the arbitration proceedings and they asked the L-M-C to reconsider their awards on the merits." Despite this impressive background, including the stipulation, this Court's notation of it, and this Court's citation of the participation in the arbitration proceedings and the request for reconsideration, the Court of Appeals approached the case as presenting a "real problem" as to "whether the two disputes are matters which are arbitrable under the provisions of the Statements of Understanding." The two disputes involved, first, the claim of the unions to have right of access to employees' cafeterias on non-working time under Section 6 of the LaSalle's Statement of Understanding, see 369 U. S. 17, 20 f. n. 4, and second, a transfer of two LaSalle's strikers to interchanged departments after the settlement, 369 U. S. 17, at 23.

The Court quickly disposed of the first claim. "Paragraph 7 of the Statement of Understanding, which deals with arbitration, gives the right of arbitration to 'any *individual employee* who may have a grievance.' (Emphasis added.) * * * The unions, not the employees, are the ones who sought arbitration. They are not given that right under the contract."

After holding that the first dispute was not arbitrable because the claim was brought to the L-M-C by the unions rather than by individual employees, the Court next took up the question of whether the defendant stores had waived the right to claim non-arbitrability after going through the arbitration and receiving an adverse ruling. The Court remarked that, "neither the amended complaint nor the stipulation set out the proceedings of the meeting or advise us whether the appellants did or did not

raise the question of the panel's jurisdiction in addition to the arguments on the merits." The Court further noted that in a letter of March 23, 1959, from counsel for the defendant stores to the L-M-C chairman, "which appears to be in the nature of a petition for reconsideration, counsel refers to the question of the jurisdiction of the panel as well as to the merits of the decision."

The Court of Appeals made reference to the proposed amended answer, which denied that any authorization was given to the L-M-C to act in the role of an arbitrator "to any extent, or in any manner on grievances filed by the plaintiff unions," and further denied that a panel drawn from the Committee ever heard any dispute as alleged in the amended complaint. Then, an entirely new issue was injected, three full years after the first arbitration hearing, where it was alleged that the L-M-C is forbidden by its charter to serve as an arbitration agency, "a fact unknown to the defendants" when the strike was settled, when the first arbitration hearings were held, and at immediate pertinent times thereafter. Since "these facts could be very much in dispute," summary judgment would not be granted.

As we interpret the Court's ruling, on the first issue, it held that (1) the dispute was not arbitrable, in that the grievances were brought by the unions rather than individual employees, as provided for in the Statement of Understanding, and (2) even though the dispute was not arbitrable, as to whether the stores waived their right to raise the claim of non-arbitrability because of their participation in the arbitration proceeding, there could be disputed issues of fact that should be resolved at trial, and (3) the claim that the L-M-C was forbidden by its charter to act as an arbitration agency raised a new issue which still might subvert the award.

As to the second issue, the grievance involving the switching of the two saleslaclies at LaSalle's, the Court concluded that it was arbitrable. Interestingly enough, the Court stated that while the unions did not have the right to arbitrate this issue, and the complaint was very indefinite as to whether it was the employees or the unions who processed the grievances, the complaint alleged that the unions were representatives of the employees, which allegation was accepted "in the absence of a denial thereof." [2]

The Court then again raised the claim of the proposed amended answer that the L-M-C was forbidden by its charter to act as an arbitrator and, "in any event, the panel was not legally constituted." Concluding that the interests of justice required the acceptance of the amended answer, and concluding accordingly that the amended answer thus raised these new issues, the second portion of the case was also reversed and remanded for a trial on the merits.

In a dissenting opinion, Judge Edwards stated that the District Court considered the parties bound by a contract to arbitrate and that the issues presented were arbitrable. He further held, "under the facts presented here," that the defendant stores waived their objection to arbitration.

As to the proffered amended answer, "I profoundly doubt that the amended pleading tendered raised any factual issue which, if resolved in defendants' favor, would

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[2] The same "representatives" claim would apply equally to the first cause of action, see Record in this Court, pp. 3-8 incl. The complaint, in Par. 11, even alleges that the grievances concerning the two individual employees "were presented by plaintiffs." The unions were as much a representative of all its members in the first cause of action as two specified members in the second cause.

serve to change the result." He did not discuss the specific effect of the new claim that the L-M-C by its charter was forbidden to act as an arbitration agency, but clearly was finding that even so, this would not affect the outcome. Petitioners will, of course, assert that same position as a matter of law.

REASONS FOR GRANTING THE WRIT.

I.

This Court's command in this case when it first came here, "[F]ederal courts should enforce these agreements on behalf of or against labor organizations and * * * industrial peace can be best obtained only in that way," is undoubtedly a powerful statement of the national labor policy. The Court of Appeals' response below was, "With respect to this aspect of arbitration, it is purely a matter of contract, not a question of policy." 341 F. 2d 715, 720. Since whether the two disputes were arbitrable was a matter of contract, the Court proceeded to look at the provisions of the agreement, interpret them, and conclude that the unions are not given the right to seek arbitration under the Statement of Understanding.

The Court undertook this task as a duplication of the work of the L-M-C panel when it first heard these grievances. Without question, the employers laid down a direct challenge to the right of the unions to bring grievances before the L-M-C. While there is no transcript of the original hearing, nor any other record of it to show what was submitted and argued, there can be no dispute about the fact that the issue of whether the unions had standing to file grievances and process them to arbitration was raised before the L-M-C on respondents' motion for reconsideration. By letter of March 23, 1959, Attorney

Green for the respondents wrote Msgr. Doyle, Chairman of the L-M-C, specifically arguing that the L-M-C panel "May be assembled only when an individual employee has a grievance which has not been satisfactorily adjusted after a presentation of such grievance to his supervisor and the Personnel Department of a store." The Court of Appeals apparently gave no consideration to this point aside from reciting it in its factual summary.[3]

The L-M-C's reply to this request[4] rejected the arguments of respondents in toto. "The decision of the panel in this case was reached after a proper hearing and as panel decisions are final and binding, the panel sees no reason to re-open the matter * * *. It is the intent and objective of the panel members to make decisions in accord with the agreement and it is the opinion of the panel that the decision rendered on March 16, 1959, is in line with this agreement."

The Court of Appeals was thus confronted with a decision of the arbitrators interpreting the basic contract to permit the unions to process grievances to arbitration, despite language on its face referring only to the rights of employees to file grievances. Interestingly enough, this same issue, like the subcontracting matter considered by this Court in *United Steelworkers v. Warrior & Gulf*, 363 U. S. 574, is grist for the arbitrators' mills. Merely as one example, in *Atlantic Seaboard Corporation*, 42 LA 856

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[3] The text of this letter is contained in Appellant's Appendix in the Court below, 13a-15a. The Court of Appeals commented in this fashion, at 341 F. 2d 715, 721: "In the letter of March 23, 1959, from Appellant's counsel to the Chairman of the Committee, which appears to be in the nature of a petition for reconsideration, counsel refers to the question of the jurisdiction of the panel as well as to the merits of the decision."

[4] This Court's record, No. 73, October Term, 1961, at R. 35, contains this document.

(1964), the arbitrator wrestled with the same precise question and concluded that the union did have a right to take a grievance to arbitration, despite contract language referring to "employee or group of employees." It was a matter of interpreting the contract, he wrote, and then cited numerous other reported arbitration cases where arbitrators had dealt with similar issues and reached similar results, as well as some cases where contrary views were stated.

The Court below apparently took the position that as a matter of law it could engage in its own interpretation of the contract and was free to reverse the ruling of the L-M-C, which it did. "The unions, not the employees, are the ones who sought arbitration. They are not given that right under the contract. *Atkinson v. Sinclair Refining Co., supra*, 370 U. S. 238, 241, 243; *Local Union No. 998, etc. v. B. & T. Metals Co., supra*, 315 F. 2d 432, 437, C. A. 6th; *Timken Roller Bearing Co. v. NLRB, supra*, 325 F. (2) 746, 753, C. A. 6th, cert. denied, 376 U. S. 971; *International Union, etc. v. Benton Harbor Malleable Industries*, 242 F. 2d 536, 541-542, C. A. 6th, cert. denied, 355 U. S. 814. See: *Vulcan-Cincinnati, Inc. v. United Steelworkers of America, etc.*, 289 F. 2d 103, 107-108, C. A. 6th."

While its list of cited cases all contain, in some manner or another, a judicial reference to grievance procedures and arbitration provisions, not one of those holdings involves a situation where arbitrators have interpreted grievance and arbitration provisions in the manner done in this case. Courts in those cases, as did this Court in *Atkinson v. Sinclair Refining Co., supra*, engaged in some analysis of the grievance and arbitration provisions as an analytical aid to deciding some other more basic

issue.[5] Extracting and emphasizing portions of this Court's opinion in *John Wiley & Sons v. Livingston*, 376 U. S. 543, 546-7, that a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit, and combining this with examples of previous judicial interpretation of grievance procedures in the cited cases, the Court of Appeals had no hesitancy about making its own interpretation of this contract contra to that of the L-M-C panel, and ruling accordingly.

This is a drastic misreading of this Court's past rulings. This is an unwarranted extension of the cases where it was judicially necessary to analyze grievance and arbitration procedures in labor agreements to make a decision on some other imposing issue. This is an undermining of the arbitration process. Not only would an arbitration ruling like *Atlantic Seaboard Corporation*, 42 LA 865, be subject to litigation to set aside (had the union there prevailed upon the substantive merits), but litigation would increase prior to the arbitration process where

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[5] In *Atkinson, supra*, this Court was faced with resolving whether an employer could bring a damage action for breach of a no-strike clause, or whether its claim should be submitted to arbitration. The Court was therefore compelled to determine the basic issue of whether there was anything in the agreement which gave the employer a right of arbitration. In *B & T Metals, supra*, the basic issue was whether or not a contract existed, not as to what party could bring a grievance. *Timken Roller Bearing, supra*, involved an enforcement of an NLRB order to bargain, as to whether the employer was compelled to furnish certain data to the union. The Court of Appeals concluded that the grievance procedure was not a proper avenue to seek such information.

Benton Harbor Malleable, supra, and *Vulcan-Cincinnati, supra*, also involved breaches of no-strike clauses. It is interesting to note that this Court, in *Atkinson*, at 370 U. S. 238, 242, n. 3, specifically stated that, "The present decision does not approve or disapprove the doctrine of the Hoover case or the Sixth Circuit cases following it (e.g., Vulcan-Cincinnati, Inc. v. United Steelworkers, 289 F. 2d 103; International Union, etc. v. Benton Harbor Malleable Indus., 242 F. 2d 536)."

courts would be thrown into the task of reading, studying, analyzing, and interpreting grievance and arbitration procedures to render their version of what they think the contract means.

"The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for." *United Steelworkers v. Warrior & Gulf*, 363 U. S. 564, 567-568. This important guideline is being seriously weakened by rulings such as this one. It is imperative that this Court resolve the deviation from the sound principles of the *Steelworker* trilogy and restore the validity and finality of labor-management arbitration awards.

There is an additional reason why the first question presented should be reviewed by this Court. The L-M-C award in this case was not only interpreting the basic contract when it held that the unions could bring grievances to it, but it was also dealing directly with the procedure of bringing a case before it. Section 7 of the LaSalle's Statement, 369 U. S. 17, 20, n. 4, was solely devoted to the procedures of resolving grievances. It was another form of a grievance and arbitration procedure that has become so common in labor-management contracts today.[6] When

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[6] Cf. *Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 565, n. 1. While that clause was more broadly drawn than this one, both clauses serve the same function: a guideline as to the procedural resolution of disputes. This is likewise the function of thousands of other similar clauses in other contracts.

the L-M-C made its ruling in this case, it was deciding that the unions had standing under the grievance procedure, Section 7, to bring the substantive issues involved to the arbitrators. This was a procedural matter to be determined before resolving the substantive issue of the grievance itself.

This Court's ruling in *John Wiley, supra,* has settled it that procedural matters are for the arbitrators, not for the courts. As was said, 376 U. S. 543, 557:

> "Once it is determined * * * that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator."

The subject matter of whether the unions had a right to solicit or contact employees in cafeterias is unquestionably a substantive issue bearing upon interpretation of Section 6 of the contract. The question decided by the Court of Appeals was whether the unions had a right to invoke a ruling on a dispute involving a claimed substantive right. Had one of the union's members at LaSalle's filed her own personal grievance claiming that she had been denied the right of visitation by her union representative under Section 6 of the Statement (whether or not Section 6 permitted such right as a matter of substance), such an individual grievance would undoubtedly be considered even by the Court below as arbitrable. Thus, the issue the Court ruled upon was one involving the procedural compliance with Section 7, as to whether an individual employee could bring the grievance or whether the union, as the employee's representative, or agent, could bring the grievance.

This Court indicated the appropriate judicial treatment of such problems in *John Wiley, supra,* at 557, when

it referred to "Doubt whether grievance procedures or some part of them apply to a particular dispute, *whether such procedures have been followed or excused* * * * cannot be answered without consideration of the merits of the dispute which is presented for arbitration." (Emphasis added.) This observation applies with particular relevance to this case.[7] Whether there be an intermingling of substance and procedure, one is as much for the arbitrator as the other.

Whether the issue be posed as "standing" to bring the suit, or "jurisdiction," as it was phrased by respondents in their 1959 arguments, or "right under the contract" to bring a grievance to arbitration, as the Court of Appeals stated it, it is essentially one of compliance with Section 7 of the Statement of Understanding, and Section 7 does no more than establish procedures for the resolution of disputes. Whether the unions could process the grievances was a matter of procedure, and matters of procedure are for the arbitrators, not for the courts. Thus, the Court of Appeals' ruling was a serious departure from the principles of *John Wiley, supra,* as stated by this Court.

Even so, as we have attempted to indicate, far more is at stake here than merely correcting the error of the

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[7] Not only was the determination by the L-M-C that the unions had a right to process the grievances a resolution of the problem of whether procedures under Section 7 must be followed or excused, but such determination had to consider the merits of the dispute itself. Section 6 of the Statement of Understanding pertained almost solely to union rights and obligations. A claim of violation of Section 6 involved the union as the representative of the employees involved. If the union had the substantive right it claimed, whose obligation was it to enforce such substantive right—the union or individual employees?

Furthermore, the Court below seems to have overlooked the fact that the L-M-C itself was the principal architect of the strike settlement, and Msgr. Doyle, so personally instrumental in ending the long dispute, had perhaps a far better understanding of what the parties intended than any reviewing court sitting in judgment many years later.

Court below. Permitting court review of "standing" to bring a grievance, or "jurisdiction" of the arbitrators, or "right" to file under the contract will go far toward turning the arbitration process back to the courts rather than to the arbitrators. The salutary effect of the *Steelworker* trilogy and of *John Wiley* will have been diluted and new efforts at litigation will be greatly encouraged.

II.

The parties here specifically chose the L-M-C as the vehicle for resolving future disputes under the Statement of Understanding. As this Court noted, 369 U. S. 17, 24, n. 6: "The parties stipulated as to the arbitration proceedings that it was 'assumed by all parties in attendance to be a meeting of a panel chosen * * * to perform proper functions delegated to such a panel under the provisions of * * * (the) Statements of Understanding * * *.'" After knowingly choosing the L-M-C as the authority to render awards, and after appearing before it in cases on the merits, and after stipulating in a court proceeding that they assumed the panel was meeting to perform proper functions, respondents then moved, some three years after the first arbitration award was rendered, to amend their answer alleging that the L-M-C is forbidden by its charter to serve as an arbitration agency, "a fact unknown to the defendants" at the time of the signing of the agreement, at the time of the first arbitration hearing, or at any time pertinent to this action.

The Court of Appeals concluded that the amended answer should have been filed, and that summary judgment for petitioners was not warranted. 341 F. 2d 715, 723. "If the District Judge had permitted the amended answer to be filed, as we think he should, there would have been injected into the case the defenses asserted by appel-

lants that the Committee was forbidden by its charter to act as an arbitrator and, in any event, the panel was not legally constituted." Judge Edwards' dissenting remarks said, at 725, "* * * I profoundly doubt that the amended pleading tendered raised any factual issue which, if resolved in defendants' favor, would serve to change the result."

Since petitioners, if ever they are to have enforcement of an arbitration award rendered in 1959, must overcome the hurdle of the issue of the authority of the L-M-C to act as an arbitration agency,[8] this portion of the case, too, must be brought to this Court. The ruling of the Court of Appeals appears to be an overly-technical frustration of an arbitration award, in flat contravention of the national labor policy, and if sustained, stands as a suggestion to talented counsel on both sides to search for latent technicalities in every future proceeding where an undesired result is obtained.

Where the parties themselves knowingly chose the L-M-C as the agency to decide their disputes, and submitted grievances to it, is it really important to these parties as a matter of law if there is a provision in the L-M-C charter forbidding it to handle arbitration? This Court supplied the answer in *General Drivers v. Riss*, 372 U. S. 517, when it reemphasized a point made in *American*

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[8] The Court of Appeals included in its discussion the issue of whether the panel was legally constituted. Since there were never any factual allegations to support such a conclusion, it is difficult to determine whether respondents' claim is but another way of attacking the authority of the L-M-C to hear the dispute. But in any event, respondents are faced with overcoming their own stipulation, as Judge Edwards pointed out in his dissent, where they agreed that "all parties" assumed that the panel was meeting to "perform proper functions delegated" to it. Accordingly, this phase of the defense, if it is even intended to be a separate statement, can be disposed of as a question of law, not of fact.

Manufacturing Co., supra, and noted this case on its previous appearance here, at 372 U. S. 517, 519:

> "* * * [F]or we have held that the policy of the Labor Act 'can be effectuated only if the means chosen by the parties for the settlement of differences under a collective bargaining agreement is given full play.' United Steelworkers v. American Manufacturing Co., 363 U. S. 564, 566: cf. Retail Clerks v. Lion Dry Goods, Inc., 369 U. S. 17. Thus, if the award at bar is the parties' chosen instrument for the definitive settlement of grievances under the agreement it is enforceable under Section 301."

The L-M-C was the parties' chosen instrument for the definitive settlement of grievances under the Statement of Understanding, regardless of possible L-M-C charter defects. If this award could be set aside on the ground that the L-M-C was forbidden to arbitrate grievances, all other later awards[9] under this Statement would be vitiated, and there would be no further arbitrations. The parties having contracted only for the L-M-C to make awards, there would be no further vehicle, no further hearings, and no further agreement on this vital means of dispute-settling. There would be no disposition on the part of the respondents to contract for a new arbitration authority, aside from the possible economic pressure of another strike and another picket line, which would be totally destructive of the labor peace this settlement sought to obtain.

There is the further issue of whether respondents, as Judge Edwards concluded in his dissent, waived their right to attack the authority of the L-M-C by waiting some three

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[9] There are still pending in the United States District Court for the Northern District of Ohio, Western Division, three more actions for enforcement of subsequent awards: *Retail Clerks v. Lamson Brothers Co.,* Civ. Action No. C-62-78; *Retail Clerks v. Lion Dry Goods,* Civ. Action No. C-62-79; *Retail Clerks v. LaSalle's,* Civ. Action No. C-62-80.

years after the first award, even though the alleged defect was previously undiscovered. The majority of the Court below, 341 F. 2d 715, 722, said there was no finding of fact to the effect that the stores "by their conduct conferred authority upon the panel to consider and pass upon the issues involved." It considered that a trial of fact was necessary to determine whether respondents had waived their right to protest the authority of the L-M-C.

Ficek v. Southern Pacific Company, 338 F. 2d 655, a ruling of the Court of Appeals for the Ninth Circuit rendered on November 20, 1964, stands for the proposition that a party, by participating in the arbitration proceedings, may not thereafter attack the "jurisdiction" of the arbitrators in a court proceeding. "The rule is sometimes stated in terms of waiver: A claimant may not voluntarily submit his claim to arbitration, await the outcome, and, if the decision is unfavorable, then challenge the authority of the arbitrators to act," said the Court at 338 F. 2d 655, 657.[10]

The Ninth Circuit also enunciated the principle of implied consent. "But an agreement to arbitrate a particular issue need not be express—it may be implied from the conduct of the parties," said Judge Browning, for a unanimous Court, at 338 F. 2d 655, 656. "Even if the initial arbitration clause was not broad enough to include Ficek's claim, by voluntarily submitting the dispute to arbitration, Ficek and the railway 'evince[ed] a subsequent agreement for private settlement which would cure any defect in the

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[10] The Ninth Circuit cited as authority the following: *Woolley v. Eastern Air Lines, Inc.*, 250 F. 2d 86, 91 (5th Cir., 1957); Symposium, 58 Nw. U. L. Rev. 521, 523 n. 13 (1963); Anno., 24 A. L. R. 2d 752, 759 (1952). See also, *United Steelworkers v. Northwest Rolling Mills, Inc.*, 324 F. 2d 479, 482 (9th Cir., 1963); *Bower v. Eastern Airlines*, 214 F. 2d 623, 626 (3rd Cir., 1954); *Michel v. Louisville & N. R. Co.*, 188 F. 2d 224, 227 (5th Cir., 1951).

arbitration clause.' *Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp.*, 274 F. 2d 805, 809 (2d Cir. 1960). See also *York & Cumberland R. R. v. Myers*, 59 U. S. (18 How.) 246, 253 (1855); *Mutual Benefit Health & Acc. Ass'n v. United Cas. Co.*, 142 F. 2d 390, 394 (1st Cir. 1944)."

As *Ficek* stands for the proposition that participation in an arbitration proceeding waives the right to later challenge any defect in the arbitration clause, or gives implied consent to the jurisdiction of the arbitrator, that ruling is in precise conflict with the holding of the Court below that, even though there was participation, whether conduct gave consent or not is a question of fact to be resolved at trial.[11]

Accordingly, the whole policy of the Labor Act of giving full play to the means chosen by the parties for the settlement of differences is involved in this portion of the case. Setting aside arbitration awards based upon technical claims, whether discovered or undiscovered at the time of hearing, will undoubtedly be implemented if the Court of Appeals below was correct in its holding.

CONCLUSION.

This Court is asked to admit this case a second time, not only because the ruling below deviates from the principles and intent of this Court's first holding, but because it raises a variety of frustrations to enforcement of arbitration awards, and thus seriously interferes with the role of the arbitration process in the formulation of labor peace. The decision below further appears to interpret this Court's oft-stated remarks in *John Wiley v. Living-*

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[11] The further claim of the respondents, that "the panel was not legally constituted," even if it seeks to inject new "facts," could also be disposed of on a waiver theory.

ston, 376 U. S. 543, that whether a party is bound to arbitrate is a matter for a court to decide, as judicial license to subject awards once rendered to careful judicial review on technical grounds. The ruling below is destructive of the national labor policy as enunciated by this Court in the *Steelworker* trilogy.

For all the reasons set forth, the petition should be granted.

Respectfully submitted,

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APPENDIX.

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT—Filed December 21, 1959.

(179 F. Supp. 564.)

KLOEB, *J.*:

Plaintiffs filed this action in this Court pursuant to Section 301 of the Labor-Management Relations Act of 1947, 61 Stat. 156, 29 U. S. C. A., Sec. 185 (a).

The amended complaint filed June 19, 1959 outlines two causes of action against the defendants, and prays in the first cause of action for an order of the Court requiring the defendants to permit non-employee representatives of plaintiffs to have access to areas of the stores of defendants, to wit, employees' cafeterias, which are not open to customers. In connection with the second cause of action, plaintiffs seek an order of the Court requiring the defendant LaSalle's to place two employees who were returned to work after the strike had ended on December 24, 1958, in their position classifications, and at the precise stations in the Men's Furnishings Department that they had occupied prior to the strike.

Attached to the amended complaint is Exhibit A, a letter from defendant LaSalle's to the chairman of the Toledo Labor-Management-Citizens' Committee, a Committee that had been engaged in mediating the differences between the respective parties and matters involved in the strike, which letter was accompanied with a "Statement of Understanding," with exhibits, all being offered to the Labor-Management-Citizens' Committee by the defendant LaSalle's.

There is also attached to the amended complaint Exhibit C, which is a letter from plaintiffs addressed to the Labor-Management-Citizens' Committee, in which they

agree to the conditions and guarantees of the "Statement of Understanding."

There are also attached to the amended complaint Exhibits D, E and F, which are documents pertaining to defendant Lion Dry Goods, Inc., and which are comparable to the LaSalle exhibits heretofore referred to.

Under date of June 29, 1959, defendants filed their answer to the amended complaint, in which they set up three [fol. 43] defenses, first, that the Court lacks jurisdiction over the subject matter, second, that the amended complaint fails to state a claim against either defendant upon which relief can be granted, and, third, that there is not in existence a contract between the plaintiffs and the defendants or either of them, as contemplated by or provided for in the Labor-Management Relations Act of 1947, and particularly Section 301 (a) thereof.

On October 15, plaintiffs filed their brief and, on October 26, defendants filed an answer brief. On November 2, plaintiffs filed a reply brief.

On November 6, in connection with oral argument, the parties filed a stipulation, which reads in part as follows (pages 2 and 3):

> "It is further stipulated by and between counsel for the parties that the plaintiff Unions and the defendants, individually, have not engaged in collective bargaining with respect to wages, hours and other terms and conditions of employment pertaining to employees of either of the defendants or for the purpose of the negotiation of an agreement concerning wages, hours, or other terms of employment, or any questions arising thereunder, or negotiations for the execution of a written contract incorporating therein any agreement negotiated or reached between the parties; and it is further stipulated between counsel that none of the rates of pay, wage schedules, terms and conditions

of the personnel policy and program, or other provisions or conditions contained in the entire plaintiffs' Exhibit B were negotiated as a result of bargaining or negotiations between either of the defendants and the Toledo Labor-Management-Citizens Committee acting for or on behalf of the plaintiff Unions; and it is further stipulated that all of the provisions contained in plaintiffs' entire Exhibit B, with the exception of Item No. 40 appearing at the last page of said exhibit, were in force and effect prior to December 24, 1958. Nothing in this paragraph is to preclude the Court from finding that [fol. 44] the settlement of Dec. 24, 1958, was a collective bargaining agreement.

"It is further stipulated by and between counsel for the parties that the employee cafeterias in the downtown stores of the defendants and of the Lamson Brothers Company are located in areas in each of the stores not open to customers; and it is further stipulated between counsel that the LaSalle employees, McGinnis and Thal, were, prior to leaving their employment because of a strike on or about November 23, 1957, employed as salesladies in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect, and that upon their return to work at LaSalle's after December 24, 1958, each was employed as a saleslady in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect, and that the only difference in their work assignments upon their re-employment after December 24, 1958 was in the station to which each was assigned to work within the Men's Furnishings Department; the one formerly assigned to the station where men's shirts were sold was assigned to the station where men's sweaters were sold, with the other being assigned to stations in reverse of the ones just mentioned, that is, her later assignment being shirts as compared to her former assignment of sweaters."

It appears that, in November of 1957, plaintiffs, who at some prior time had been the recognized bargaining agents for the Retail Associates, Inc., comprised of four downtown department stores in Toledo, Ohio, and including the two defendants herein, called a strike against the four members of the Retail Associates, Inc. During the period of the strike, from November of 1957 to December 24, 1958, plaintiffs were not and do not claim to have been and are not now the recognized majority representatives of the employees of defendants. They do not claim to have such rights. They admit that they do not represent a majority [fol. 45] of the employees of the defendants, but they say that they do represent some employees and that because of this representation they are entitled to petition for the enforcement of a contract under Section 301 (a).

A few days prior to December 24, 1958, a plan was advanced by the chairman of the Toledo Labor-Management-Citizens' Committee whereby it was suggested that, if defendant LaSalle's would re-employ the strikers, plaintiffs would disclaim that they represented a majority of the employees of defendants. At that particular time LaSalle's was the only store where workers were out on strike.

Upon the presentation to the Labor-Management-Citizens' Committee of the exhibits heretofore referred to and that are attached to the amended complaint, picketing ceased and the strike was declared off. Employees of defendants LaSalle's were restored to work in due course in accordance with the Statement of Understanding.

It appears now that the defendants refuse to permit certain representatives of plaintiffs to enter the employees' cafeteria for the purpose of soliciting membership. This the plaintiffs complain of in their first cause of action in the amended complaint. Paragraph 6 of Exhibit B attached to the complaint reads in part as follows:

"* * * Nothing herein shall preclude an employee representative from entering areas of the store which are open to customers; or from communicating with employees, provided such communication is on the employee's non-working time and in no way interferes with the operating of the business."

Defendants claim that the employees' cafeteria is an area which is not open to customers and that, therefore, plaintiffs' agents are precluded from communicating with defendants' employees in these areas. Plaintiffs are of the opinion that they have a right to communicate with defendants' employees in these areas provided such communication is on the employees' non-working time and in no way interferes with the operation of the business of the defendants.

[fol. 46] Plaintiffs' second cause of action is based on the ground that, while employees McGinnis and Thal, who up to December 24, 1958, were striking employees, and were re-employed as salesladies in the Men's Furnishings Department following their return to work, they were not again stationed at the exact counters theretofore occupied by them but that they were caused to exchange their positions at the shirt and sweater counters. There is no dispute but that the rate of pay was not reduced upon their return to work and that their earnings and earning opportunities are not changed.

The grounds relied upon in these two causes of action appear to be tenuous indeed and to be based on grievances that are not weighty in character. However, they do provide a "causus belli." Whether there is justification for taking the time of a Court because of these differences between the parties is open to grave question.

It is plaintiffs' position that the Statements of Understanding presented by defendants to the Labor-Manage-

ment-Citizens' Committee and the subsequent concurrence in these statements by plaintiffs constitute a contract, at least a contract for the benefit of plaintiffs, and that it is, therefore, such a contract as is contemplated by Section 301 (a) of the Act.

Section 301(a) of the Act, 29 U. S. C. A. Sec. 185(a), reads as follows:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

It is the contention of the defendants that, while Section 301(a) refers to contracts between an employer and a labor organization representing employees, this has reference to collective bargaining contracts, or agreements [fol. 47] arrived at through collective bargaining, and could not have reference to the situation that obtains here.

From a study of the legislative background of the Act, and from certain decisions that we have examined, we are of the opinion that the strike settlement agreement that was concluded on December 24, 1958 is not such a contract as is contemplated by Section 301(a) of the Act, and that, therefore, we do not have jurisdiction over the subject matter.

The plaintiffs have cited and apparently rely upon the cases of *Local 19, etc. v. The Buckeye Cotton Oil Company*, 236 Fed. (2d) 776, and *A. L. Kornman Company v. Amalgamated Clothing Workers of America*, 264 Fed. (2d) 733, cert. den. Oct. 12, 1959.

These are cases that were decided by the Sixth Circuit Court of Appeals but, upon examination, we find that they both grow out of disagreements over existing collective bargaining agreements that were duly entered into by the parties under and in accordance with the provisions of the Act.

In the case at bar, the Statements of Understanding specifically point out that nothing contained therein is to be construed as giving recognition to the Union unless, at some future time within the discretion of the Union, the Union is certified as having been chosen by a majority of employees in a single store unit election conducted by the National Labor Relations Board. At no time have plaintiffs been so certified by the National Labor Relations Board. The Statements of Understanding further provide that the Union agrees that it will not request bargaining rights unless it proves its right to represent the employees, and that the employer will not recognize any Union except upon certification by the National Labor Relations Board.

We believe that the Act, in lodging authority in any District Court of the United States, contemplates such authority to be exercised where there has been a violation of a contract that had been entered into between an employer and a labor organization representing employees in an industry affecting commerce and that it thereby contem- [fol. 48] plates a collective bargaining agreement. The agreement that we are here considering is a strike settlement agreement which we cannot construe as having been entered into for the benefit of plaintiffs.

In the case of *Schatte, et al. v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of United States and Canada, et al.*, 84 Fed. Supp. 669, aff. 182 Fed. (2d) 158, cert. den. 340 U. S. 827, we find the following (p. 672, par. 4):

"Whatever else may be said (and a great deal has been said in scores of pages of briefs and more than three full days of argument), any right of recovery under Section 301 must rest upon a *contract* and its asserted violation. *The whole Act relates to labor contracts, hence it must be a contract contemplated by the Act, i.e., a collective bargaining contract or contract relating to fair or unfair labor practices.* * * *" (Emphasis supplied.)

On page 673, pars. 7 and 8, we find the following:

"The plaintiffs contend that in any event they are appropriately parties plaintiff under Rule 23, Federal Rules of Civil Procedure, 28 U. S. C. A., relating to class suits. Whether they do or could qualify under that rule is not necessary to determine as the provisions of Sec. 301 are inconsistent with Rule 23, Federal Rules of Civil Procedure, and must therefore prevail. *Sec. 301 is a special and limited grant of jurisdiction which must be strictly construed.* This is especially so in the light of the history of legislation dealing with labor relations and disputes such as the Clayton Act, 15 U. S. C. A. § 17, the Norris-LaGuardia Act, 29 U. S. C. A. § 101 et seq., the Wagner Act, 29 U. S. C. A. § 151 et seq., and the Act under consideration." (Emphasis supplied.)

We are of the opinion that collective bargaining contracts between a Union and an employer were the only "contracts" intended to be actionable in a District Court of the United States under the provisions of Section 301(a), and that [fol. 49] none of the factors which give substance to the rights of Unions to bring actions under Section 301 are present in this case, and particularly a contract between plaintiffs and defendants. We, therefore, conclude that the Court is without jurisdiction to entertain this case, and the complaint is, therefore, dismissed.

Defendants may prepare and file findings of fact and conclusions of law drawn in accordance with this Memo-

randum Opinion within fifteen (15) days, and the plaintiffs may, within ten (10) days thereafter, file any suggested amendments or additions thereto.

(signed) FRANK L. KLOEB,
United States District Judge.

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS—December 15, 1960.

(286 F. 2d 235.)

This appeal from the judgment of the United States District Court, dismissing the complaint of appellants, has been heard and considered upon the record and upon the oral arguments and briefs of the parties.

This Court is of opinion that the district court correctly construed Section 301 of the Labor-Management Relations Act of 1947 [29 U. S. C. A., section 185(a)] and was free from error in holding that it had no jurisdiction over the subject matter of the litigation. The contract here involved is not a collective bargaining agreement between an employer and a labor organization representing its employees. We think that the trial court was correct in reaching the [fol. 54] conclusion that collective bargaining contracts between a union and an employer are the only contracts intended to be actionable in a United States District Court under the provisions of section 301(a).

In our judgment, United States District Judge Kloeb was right in concluding that he was without jurisdiction in this case. He, therefore, properly dismissed the complaint.

Accordingly, for the reasons stated in the opinion of the District Judge, the judgment of the district court is affirmed.

It is so ordered.

John D. Martin, United States Circuit Judge.

OPINION OF THE UNITED STATES COURT OF APPEALS—February 23, 1965.

(341 F. 2d 715.)

Before: WEICK, Chief Judge, MILLER and EDWARDS, Circuit Judges.

MILLER, Circuit Judge. The plaintiffs, Retail Clerks International Association, Local Unions Nos. 128 and 633, filed this action in the District Court to enjoin the defendants, Lion Dry Goods, Inc., and LaSalle's, from violating their agreements of December 24, 1958, with the plaintiffs, by refusing to accept and honor an arbitration award made by a panel of arbitrators pursuant to the terms of said agreement.

The material facts are not in dispute. The defendants are engaged in operating retail department stores in Toledo, Ohio. The plaintiffs are labor organizations representing employees in industries affecting commerce for the purpose of collective bargaining, but were not on December 24, 1958, or subsequent thereto, the recognized majority representatives of the employees of the defendants or either of them. This action was brought pursuant to Sections 301(a) and (b) of Title 29, United States Code, Labor Management Relations Act of 1947.

Plaintiffs were parties to collective bargaining contracts with defendants for many years prior to 1957. In November 1957 negotiations for renewal contracts were unsuccessful. Plaintiffs thereupon went on strike against defendant LaSalle's, which continued until December 24, 1958. The plaintiffs did not go on strike against the defendant Lion Dry Goods, Inc., but continued their dispute with that defendant until December 24, 1958. A few days before December 24, 1958, the Toledo Labor-Management-Citizens Committee, a local mediation and arbitration body (hereinafter referred to as the Committee), proposed

a plan for settling the dispute. Discussions ensued between the Committee and the plaintiffs and between the Committee and the defendants, but at no time were direct negotiations carried on between the plaintiffs and the defendants. Each side made known to the Committee the conditions under which it was willing to terminate the dispute and the Committee discussed these conditions with the other side. In this manner a basis for settlement was reached, which was known as a "Statement of Understanding," which was satisfactory to all parties. Each store sent to the Committee its "Statement of Understanding," calling it the basis on which the existing dispute between the locals and the defendants was to be fully and finally resolved. A few days later the locals wrote the Committee "we herewith agree to the conditions and guarantees of the Statement of Understanding." The conditions to be performed by each side were performed and the dispute was terminated.

The Statements contained the unions' acknowledgment that they were not then entitled to recognition as exclusive representatives and would not seek such recognition unless and until certified as so entitled in single store unit elections conducted by the National Labor Relations Board. The stores' agreement continued in effect detailed wage and hour schedules and provisions as to working conditions and other benefits, incorporated as exhibits to the Statement. Although the Statements were not identical in all respects they both contained the following provisions, which give rise to the present controversy. We quote the following from LaSalle's Statement of Understanding.

> "* * * Nothing herein shall preclude an employee representative from entering areas of the store which are open to customers; or from communicating with employees, provided such communication is on the

employee's non-working time and in no way interferes with the operating of the business.

"7. Any individual employee who may have a grievance involving an interpretation or application of or arising under the terms of this understanding with L-M-C, and who has presented such grievance to his supervisor and the Personnel Department without reaching a satisfactory solution, may take his case to the chairman of the L-M-C who in turn shall refer the case to a panel of the L-M-C, whose majority decision and order shall be final and binding. The panel shall render its decision and order within fifteen days after the grievance has been submitted to it. The procedure regulating the hearing of the grievance by the L-M-C panel shall be determined by the panel."

Paragraph 1 of LaSalle's Statement of Understanding also provided that the striking employees would be reinstated without discrimination because of strike activities and without loss of seniority. Paragraph 2 provided that employees who made the required application for reinstatement would be returned to work "in their former position classifications if vacant or in positions comparable in duties and earning opportunities."

A few months later the following disputes arose. (1) The unions claimed the right of access to the employees' cafeterias in order to communicate with employees during their nonworking time. The defendants refused to allow union organizers this right of access, claiming that Paragraph 6 of the Statement of Understanding gave no right of access to the employees' cafeterias because they were not "areas of the store which are open to customers." It was stipulated between the parties for the purposes of this litigation that the employee cafeterias in the downtown stores of the defendants were located in areas not open to customers. The unions complained to the Commitee,

charging undue harassment of union organizers and a breach of the defendants' contract obligation; (2) two LaSalle's employees, who were salesladies in the Men's Furnishings Department, were fully reinstated after the strike to sales positions in the Men's Furnishings Department with the exception that the saleslady formerly assigned to sell men's shirts was assigned to sell men's sweaters, and the other saleslady, who was formerly assigned to sell sweaters, was assigned to sell shirts. It was stipulated by the parties that the two salesladies were, prior to leaving their employment because of the strike on or about November 23, 1957, employed as salesladies in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect, and that upon their return to work at LaSalle's after December 24, 1958, each was employed as a saleslady in the Men's Furnishings Department in the highest wage classification provided in the wage schedules then in effect. The failure of LaSalle's to assign these employees to their former selling stations brought a complaint from the union to the Committee.

Proceeding under the provisions of Paragraph 7 of LaSalle's Statement of Understanding, the Committee referred these complaints to a panel which held a hearing on March 5, 1959, and handed down its decision on March 12, 1959. Awards went to the unions on both complaints, holding that the unions' right to contact employees applied to employee cafeterias as well as the public cafeterias, and that both the clerks at LaSalle's should be restored to their identical positions which they had before the strike. The stores refused to honor and accept these awards, following which this action was filed to require the stores to comply with the awards.

This is the second time this case has been before this

Court. A review of its history is as follows. An amended complaint was filed on June 19, 1959. The defendants filed an answer on June 29, 1959, asserting as their first defense that the Court lacked jurisdiction over the subject matter. In other defenses they denied that there was in existence any contract between the plaintiffs, or either of them, and the defendants, or either of them, or that assurances given by the defendants to the Committee were for the benefit of the plaintiffs-unions. The answer also asserted that there was not in existence any contract between the plaintiffs and the defendants, or either of them, as contemplated by and provided for in the Labor Management Relations Act of 1947, and denied the right or authority of the Committee to arbitrate any grievance which the plaintiffs might claim to have. The case was submitted to the Court on the pleadings, a stipulation, briefs and oral argument.

The District Judge made findings of fact that the plaintiffs were not the recognized majority representatives of the employees of the defendants or either of them, that the Statement of Understanding given by each of the defendants to the Committee was a strike settlement statement, that it was not a collective bargaining contract negotiated by or on behalf of the plaintiffs with either of the defendants, and that there was no existing working contract between the plaintiffs and either of the defendants. He ruled as a matter of law that each Statement of Understanding was not a contract as contemplated by Section 301(a) of the Labor Management Relations Act of 1947 and that the Court was without jurisdiction of the subject matter of the action. The complaint was accordingly dismissed. The opinion of the District Judge is reported at *Retail Clerks International Association, Local Unions No. 128 and 633 v. Lion Dry Goods, Inc., and LaSalle's*, 179 F. Supp. 564.

On appeal to the Court of Appeals this Court affirmed the judgment of the District Court. This ruling, in the form of an order, is reported at 286 F. (2) 235.

The Supreme Court granted certiorari and on February 26, 1962, reversed the judgment of the District Court. The opinion of the Court is reported at *Retail Clerks International Association, Local Unions, etc. v. Lion Dry Goods, Inc., et al.*, 369 U. S. 17. Reference is made to the opinions of the District Court and the Supreme Court for a more detailed statement of the facts. In reversing the judgment of the District Court and of the Court of Appeals the Supreme Court did not pass upon the merits of the controversy or construe Paragraphs 6 and 7 of the LaSalle's Statement of Understanding. Its ruling was restricted to the question whether the Statement of Understanding was a contract as contemplated by Section 301(a) of the Labor Management Relations Act of 1947. It held that the Statement of Understanding was such a contract and that the District Judge had jurisdiction of the action. The cause was remanded to the District Court for further proceedings consistent with its opinion.

Following remand, the plaintiffs moved for summary judgment on May 3, 1962. On May 11, 1962, the defendants filed a memorandum in response to the motion for summary judgment suggesting to the Court that the plaintiffs' motion was premature. The memorandum stated that the Clerk of the District Court had from time to time informed the defendants that the case would not take its place on the active list until a mandate was received from the Court of Appeals; that upon receipt of such mandate the District Court would reinstate the case to the active list by an order, a copy of which would be received by counsel for the parties; and that under such procedure the case had not been returned to the Court's docket and the motion for

summary judgment was premature. The memorandum also stated that if this was a misunderstanding as to the status of the case and the case had been reinstated on the docket, counsel for defendants requested permission to tender a motion to file an amended answer.

On May 24, 1962, the defendants moved for an order permitting them to amend their answer, pointing out that following the original decision of the District Court the Supreme Court had received the trilogy of cases involving the United Steelworkers, reported at 363 U. S., pages 564, 574, and 593, which made an amendment of the answer imperative in order for the defense to present issues which had become germane and proper by reason of said decisions. A proposed answer was tendered at the same time.

On September 25, 1962, the plaintiffs' motion for summary judgment was sustained. On September 26, 1962, the defendants' motion for an order permitting them to amend their answer was overruled. Defendants' request for reconsideration, filed on September 28, 1962, was denied on November 27, 1962. Judgment was entered on February 19, 1963, directing the defendants to comply with the arbitration awards of the Committee of March 12, 1959. This appeal followed.

Defendants contend that, although the Statement of Understanding given by each of them was a "contract" within the provisions of Section 301(a), Title 29, United States Code, with resulting jurisdiction in the District Court, as decided by the Supreme Court, the Committee was not empowered or authorized under the terms of the Statement of Understanding to conduct an arbitration of the two questions herein involved; that the two arbitration awards were incorrect and invalid; and that the District Judge erred in refusing to permit them to file their amended answers and in sustaining plaintiffs' motion for

summary judgment in the face of the existence of disputed questions of fact and without the opportunity for the defendants to be heard.

The plaintiffs contend that the controversies between the parties were grievances within the provisions of the Statement of Understanding; that the two awards made by the panel of arbitrators were final and binding under the provisions of Paragraph 7 of the LaSalle's Statement of Understanding and were not subject to review by the District Court or by this Court; and that there was no error on the part of the District Judge in sustaining the motion for summary judgment some four months and three weeks after it was filed, during which time the defendants failed to oppose it, although they were given an opportunity to do so under Rule 56(c), Rules of Civil Procedure.

Arbitration is a matter of contract and a party can not be required to submit to arbitration any dispute which he has not agreed so to submit. Whether or not a party to a contract is bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court, not by the arbitrator, on the basis of the contract entered into by the parties. *United Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U. S. 574, 582; *Atkinson v. Sinclair Refining Co.*, 370 U. S. 238, 241; *John Wiley & Sons, Inc. v. Livingston, etc.*, 376 U. S. 543, 546-547; *Jefferson City Cabinet Co. v. International Union, etc.*, 313 F. (2d) 231, 232-233, C. A. 6th, cert. denied, 373 U. S. 936.

If the Court finds as a matter of law that there is no valid contract between the parties providing for arbitration of disputes between the parties or, although such a contract may exist, it does not by its terms provide that the particular dispute involved is an arbitrable one, neither party can be required to submit the dispute to arbitration. *Atkinson v. Sinclair Refining Co., supra*, 370 U. S. 238, 241,

243; *Jefferson City Cabinet Co. v. International Union, etc., supra,* 313 F. (2) 231, 233, C. A. 6th, cert. denied, 373 U. S. 936; *Local Union No. 998, etc. v. B. & T. Metals Co.,* 315 F. (2) 432, C. A. 6th; *Timken Roller Bearing Co. v. N. L. R. B.,* 325 F. (2) 746, 752-753, C. A. 6th, cert. denied, 376 U. S. 971; *Palnau v. Detroit Edison Co.,* 301 F. (2) 702, 704, C. A. 6th; *Local Union No. 787, etc. v. Collins Radio Co.,* 317 F. (2) 214, 219-220, C. A. 5th; *Procter & Gamble Independent Union, etc. v. Procter & Gamble Mfg. Co.,* 312 F. (2) 181, C. A. 2nd, cert. denied, 374 U. S. 830; *Local Union No. 12405, etc. v. Martin Marietta Corp.,* 328 F. (2) 945, C. A. 7th.

If, however, the Court finds as a matter of law that a valid contract providing for arbitration of certain disputes exists and that the particular dispute involved is covered by the contract, arbitration will be decreed. In such a case whether procedural requirements under the contract have been complied with or have been excused by reason of the particular circumstances existing, is a question for the decision of the arbitrator. *John Wiley & Sons, Inc. v. Livingston, etc., supra,* 376 U. S. 543, 555-559; *Local 748, etc. v. Jefferson City Cabinet Co.,* 314 F. (2) 192, 194-196, C. A. 6th, cert. denied, 377 U. S. 904. Usually, collective bargaining contracts calling for arbitration provide that the decision of the arbitrator shall be final and binding. Paragraph 7 of LaSalle's Statement of Understanding so provided.

There is no real dispute between the parties about these legal principles. The difference between them is in the application of the principles to the particular facts of this case.

We agree with the appellees' contention that if the right to arbitration exists, which we will discuss later, the rulings or awards of the arbitrators are final and not subject to review by the Court. This contention is fully sup-

ported by the authorities. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564, 568; *United Steelworkers v. Warrior & Gulf Nav. Co., supra*, 363 U. S. 574; *Jefferson City Cabinet Co. v. International Union, etc., supra*, 313 F. (2) 231, C. A. 6th, cert. denied, 373 U. S. 936.

Our real problem is in determining whether the two disputes are matters which are arbitrable under the provisions of the Statements of Understanding. We recognize that the Supreme Court has stated in the recent *United Steelworkers* cases that the use of arbitration for the final disposition of labor-management disputes is favored as a national policy. At the same time, however, the Supreme Court has made it very clear in the cases hereinabove referred to that arbitration is a matter of contract and a party can not be required to submit to arbitration any dispute which he has not agreed so to submit. The recognition of this right was just recently restated in *John Wiley & Sons, Inc. v. Livingston, etc., supra*, 376 U. S. 543, 546-547. With respect to this aspect of arbitration, it is purely a matter of contract, not a question of policy. A national policy favoring arbitration does not authorize arbitration unless the contract so provides. *Atkinson v. Sinclair Refining Co., supra*, 370 U. S. 238, 241.

We are of the opinion that the claim of the unions was not one subject to arbitration. Paragraph 7 of the Statement of Understanding, which deals with arbitration, gives the right of arbitration to "any *individual employee* who may have a grievance." (Emphasis added.) The individual employee may prosecute his grievance and take his case to the committee for arbitration. The unions, not the employees, are the ones who sought arbitration. They are not given that right under the contract. *Atkinson v. Sinclair Refining Co., supra*, 370 U. S. 238, 241, 243; *Local*

Union No. 998, etc. v. B. & T. Metals Co., supra, 315 F(2) 432, 437, C. A. 6th; *Timken Roller Bearing Co. v. N. L. R. B., supra,* 325 F(2) 746, 753, C. A. 6th, cert. denied, 376 U. S. 971; *International Union, etc. v. Benton Harbor Malleable Industries,* 242 F(2) 536, 541-542, C. A. 6th, cert. denied, 355 U. S. 814. See: *Vulcan-Cincinnati, Inc. v. United Steelworkers of America, etc.,* 289 F(2) 103, 107-108, C. A. 6th.

The argument is made that the contention of appellants that the grievances herein involved were not arbitrable ones under the Statement of Understanding comes too late, in that the parties treated the issues as arbitrable and the appellants participated in arbitration without raising the question until after the adverse ruling of the arbitrators. We do not think that this argument is applicable under the present status of this case.

The record with respect to this is not as satisfactory as it could be. The amended complaint alleges that a panel of the Committee held a hearing on March 5, 1959, and transmitted its decision to the parties on March 12, 1959. The parties stipulated that counsel for the appellants appeared on behalf of the appellants at this meeting, which the parties in attendance "assumed" to be a meeting of a panel chosen by the Committee to perform proper functions delegated to it under the provisions of the Statement of Understanding. But neither the amended complaint nor the stipulation set out the proceedings of the meeting or advise us whether the appellants did or did not raise the question of the panel's jurisdiction in addition to the arguments on the merits.

In the letter of March 23, 1959, from appellant's counsel to the Chairman of the Committee, which appears to be in the nature of a petition for reconsideration, counsel refers to the question of the jurisdiction of the panel as

well as to the merits of the decision. In the original answer of the appellants, filed on June 29, 1959, ten days after the filing of the amended complaint, the appellants deny that any recognition was given to any decision of the Committee by way of a request for reconsideration of a decision of a panel of the Committee with regard to any rights claimed by the plaintiffs.

In the proposed amended answer, which the appellants tendered for filing, the appellants deny that they gave any assurances to the plaintiffs or to the Committee authorizing the Committee to act in the role of arbitrator "to any extent; or in any manner on grievances filed by the plaintiff unions." This proposed answer also denies that a panel authorized by and drawn from the Committee ever heard any dispute as alleged in the amended complaint and expressly alleges that the Committee is forbidden by its charter to serve as an arbitration agency, "a fact unknown to the defendants on December 24, 1958, March 5, 1959, March 12, 1959, April 7, 1959, or any other time pertinent to this action, and not discovered by the defendants until after the filing of the amended complaint herein." The tendered answer in a separate paragraph also expressly denies that the panel which acted in the premises was authorized by the appellants "to act in any way, to any extent, or in any manner whatsoever."

In the order overruling appellant's motion to file the amended answer, the only reason given for doing so is "good cause therefor appearing." In the order granting the plaintiff's motion for summary judgment, the reasons given for doing so are given as the judgment of the United States Supreme Court remanding the cause to the District Court, that there is no genuine issue of fact to be submitted to the trial court and the court's conclusion that the plaintiffs were entitled to judgment as a matter of law without, however, discussing the legal issues involved.

Accordingly, we do not construe the ruling of the District Judge as being based upon the theory that the appellants by their conduct conferred authority upon the panel to consider and pass upon the issues involved. There is no finding of fact to that effect. We are not permitted to make such a finding on this review. The position taken by the appellants at the meeting of the arbitrators and other statements bearing on the issue possibly made by them are not before us. Under the pleadings, including the proposed amended answer, it appears that these facts could be very much in dispute. It may be that this case may eventually be decided upon that ground, but the judgment can not be affirmed at the present time based upon such a reason.

With respect to the grievances of the two salesladies at LaSalle's, we are of the opinion that they were arbitrable grievances. The salesladies were employees of LaSalle's who were given the right of arbitration under the Statement. Although the union did not have the right to arbitrate this issue, and the amended complaint is very indefinite about whether the two employees or the union processed these grievances and presented them for arbitration, it does allege that the plaintiffs were representatives of the two employees in the proceeding, which allegation is accepted in the absence of a denial thereof.

With respect to the procedural aspects of the case, we are of the opinion that the District Judge was in error in overruling defendants' motion to amend their answer. Rule 15(a), Rules of Civil Procedure, provides for the filing of an amended pleading and states that "leave shall be freely given when justice so requires." The amended answer denied the authority of the selected panel to act as an arbitrator, which raised a new issue in the case, the determination of which involved factual questions not be-

fore the Court. Some of the facts alleged in the amended answer were very material to the issue and were not known by the appellants at the time of the arbitration or at the time the original answer was filed. The brief order sustaining the motion for summary judgment does not refer to this new issue, which apparently was not considered by the Court. We see no prejudice to the plaintiff in permitting the amended answer to be filed. *Cooper v. American Employers' Insurance Co.*, 296 F (2) 303, 306-307, C. A. 6th. Clearly, there was no urgency in proceeding with the case. The amended answer was tendered on May 24, 1962. The motion to file it was not overruled until September 26, 1962. The Supreme Court said in *Foman v. Davis*, 371 U. S. 178, 182, "Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." The Court also said in the opinion in that case that it is too late in the day and entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on the basis of mere technicalities. See also: *Cooper v. American Employers' Insurance Co., supra*, 29 F (2) 303, 306, C. A. 6th; *Lone Star Motor Import, Inc., v. Citroen Cars Corp.*, 288 F. (2) 69, 75, C. A. 5th. The defendants should have been permitted to file the amended answer. *McHenry v. Ford Motor Co.*, 269 F. (2) 18, 24, C. A. 6th; *Breier v. Northern California Bowling Proprietors' Association*, 316 F (2) 787, 789-790, C. A. 9th. The fact that it was tendered after remand to the District Court for further proceedings does not change the rule. *City of Texarkana, Texas, v. Arkansas Louisiana Gas Co.*, 306 U. S. 188, 203. Where an amended

pleading has been tendered and permission to file it should be given, an adversary motion for summary judgment should not be granted before it is filed and considered. *Castner v. First National Bank of Anchorage*, 278 F(2) 376, 384, C. A. 9th; *Rossiter v. Vogel*, 134 F(2) 908, 912, C. A. 2nd. See also: *Kane v. Chrysler Corp.*, 80 F. Supp. 360, 366, D. C. Del.

If the District Judge had permitted the amended answer to be filed, as we think he should, there would have been injected into the case the defenses asserted by appellants that the Committee was forbidden by its charter to act as an arbitrator and, in any event, the panel was not legally constituted. Under such circumstances the case was not one for summary judgment. *Sartor v. Arkansas Gas Corp.*, 321 U. S. 620, rehearing denied, 322 U. S. 767; *S. J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F(2) 235, 237-238, C. A. 6th, cert. denied, 375 U. S. 824.

The judgment is reversed and remanded for further proceedings consistent with the views expressed herein.

EDWARDS, Circuit Judge, Dissenting.

The encouragement of the use of arbitration as a device for quick and final disposition of labor-management disputes has been adopted as national policy, both by the United States Supreme Court and the Congress of the United States. *United Steelworkers v. American Manufacturing Co.*, 363 U. S. 564 (1960); *United Steelworkers v. Enterprise Corp.*, 363 U. S. 593 (1960); *United Steelworkers v. Warrior & Gulf Co.*, 363 U. S. 574 (1960); 9 U. S. C. §§ 3 and 4.

With all respect to my colleagues, I suggest that the disposition of this controversy arrived at in the District Court's judgment is proper implementation of that policy.

The agreement which the United States Supreme Court found to be a contract as contemplated by Sec. 301(a) of the Labor Management Relations Act of 1947, *Retail Clerks v. Lion Dry Goods*, 369 U. S. 17, 25, 26 (1962), was entered into December 24, 1958. It provided for "final and binding arbitration" where a grievance arose "involving an interpretation of or arising under the terms of this understanding."

The parties in the current dispute were the parties involved in the contract referred to. Several months after the contract two grievances were submitted for arbitration under the contract, the parties proceeded to arbitration and a disposition was handed down by a panel appointed to arbitrate.

Defendants refused to accept these awards and that refusal led to litigation which started at the District Court level, 179 F. Supp. 564 (N. D. Ohio 1959), traveled to this court on appeal, 286 F. 2d 235 (C. A. 6, 1960), and to the United States Supreme Court, 369 U. S. 17 (1962), where the case was reversed and remanded to the District Court.

The District Judge then entered summary judgment on the pleadings and an agreed statement of facts, in accordance with what he thought to be the import and intent of the United States Supreme Court's opinion. Another appeal being taken to this Court, it is proposed that we again remand the matter—this time for trial at the District Court level.

I believe that, although this contract was no work of art, the intentions of the parties were reasonably effectively expressed therein, and that properly read it called for final and binding arbitration of all grievances "involving an interpretation or application of or arising under the terms of this understanding."

Where the contract calls for binding arbitration, the function of the court is limited to determining whether or not the party seeking arbitration is making a claim which, on its face, is governed by the contract. *United Steelworkers v. American Manufacturing Co., supra,* at 568.

I read the District Judge's decision as a finding that the parties were bound by the contract to arbitrate and that the issues presented for arbitration were arbitrable. I believe that as a matter of contract interpretation the District Judge was right in so holding.

Further, it is of great significance that both of the parties themselves treated the issues as arbitrable; that they both submitted the issues to arbitration; that they both participated in arbitration, and that the appellant first decided the issues were not arbitrable after appellant had lost before the arbitrator and then lost before the United States Supreme Court.

In this regard we note the following paragraph in the stipulation of facts upon which this case was originally submitted:

> "It is further stipulated by and between counsel for the respective parties that Merritt W. Green, counsel for the defendants, appeared on behalf of the defendants at a meeting held on March 5, 1959 in the Catholic Charities Building, Toledo, Lucas County, Ohio, which said meeting was presided over by Monsignor Michael Doyle and assumed by all parties in attendance to be a meeting of a panel chosen by the Toledo Labor-Management-Citizens Committee to perform proper functions delegated to such a panel under the provisions of Section 7 of plaintiffs' Exhibit B at page 2, and Section 4 of plaintiffs' Exhibit E at page 2, both of which exhibits are set forth in the amended complaint. (Statements of Understanding

delivered to Monsignor Doyle by Lasalle's and The Lion Store respectively.)"

We also note Monsignor Doyle's letter to appellants' attorney when he sought reconsideration of the arbitration panel's decisions in this same matter:

"Dear Mr. Green:

"This acknowledges your letter of March 23, 1959 protesting the decision of the panel with respect to procedure of union organizers in contacting store employees for the purpose of soliciting union membership.

"The agreement of December 24, 1958, provides among other things, that all panel decisions are 'final and binding.' The decision of the panel in this case was reached after a proper hearing and as panel decisions are final and binding, the panel sees no reason to re-open the matter."

Under the facts presented here if defendant-appellant had an objection to arbitration of either of the issues, it seems clear to me that his course of conduct waived it.

In *United Steelworkers v. American Manufacturing Co., supra,* the Supreme Court said:

"Section 203(d) of the Labor Management Relations Act, 1947, 61 Stat. 154, 29 U. S. C. § 173(d), states, 'Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. * * *' That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play." *United Steelworkers v. American Manufacturing Co., supra* at 566.

I believe the District Judge on remand properly enforced the arbitration awards rendered under the contract on the pleadings and stipulated facts as they stood before him.

I also believe that the District Judge acted well within his discretion at that late hour of this litigation in refusing defendants' proffered amended answer. Over and above defendants' delay in presenting the proposed amendment, I profoundly doubt that the amended pleading tendered raised any factual issue which, if resolved in defendants' favor, would serve to change the result.

Further, Rule 15(a) of the Federal Rules of Civil Procedure provides for amendment of pleadings (after expiration of the normal 20 days' time for such amendment) "only by leave of the court or by written consent of the adverse party; and leave shall be freely given when justice so requires." This has universally been interpreted to mean that the trial court is vested with a sound discretion in granting or denying amendment and that his decision will not lightly be overturned. See *Bowles v. Biberman Bros.*, 152 F. 2d 700 (C. A. 3, 1946); *Chesapeake & Ohio Railway Co. v. Newmann*, 243 F. 2d 804 (C. A. 6, 1957); *Morton v. Local 20, Teamsters, Chauffeurs, and Helpers Union*, 320 F. 2d 505 (C. A. 6, 1963), *modified on other grounds*, 377 U. S. 252 (1964); 1A Barron & Holtzoff § 445, p. 722, and cases cited.

I do not believe that, on this record, justice requires a finding that the District Judge abused his discretion.

JUDGMENT OF THE UNITED STATES COURT OF APPEALS—February 23, 1965.

Appeal from the United States District Court for the Northern District of Ohio.

This cause came on to be heard on the record from the United States District Court for the Northern District of Ohio and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for further proceedings consistent with the opinion.

It is further ordered that defendant-appellants recover from plaintiff-appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court.